IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0403
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
DAVID ALAN DOOGAN,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-61846

Honorable Christopher Browning, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

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E C K E R S T R O M, Presiding Judge.

¶1 In 1999, Petitioner David Alan Doogan pled guilty to two counts of second-degree murder and was sentenced to concurrent prison terms of twenty-two years. In exchange for Doogan's testimony against his codefendant, Shad Armstrong, the state dismissed the original charges against Doogan of first-degree murder and conspiracy to commit first-degree murder. Doogan testified against Armstrong at trial. Armstrong was convicted and sentenced to death.

¶2 Following its opinion in *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003) (*Ring III*), our supreme court ordered that Armstrong be resentenced, a process that would require a jury trial on aggravating and mitigating circumstances. The state offered Doogan use immunity to secure Doogan's testimony in those proceedings. The court immunized Doogan and ordered him to testify. In defiance of the court order, Doogan refused to testify further. The court found him in contempt of court, pursuant to Rule 33, Ariz. R. Crim. P., 17 A.R.S., but did not sentence him immediately, giving Doogan the opportunity to purge his contempt by agreeing to testify. Three days later, the court asked Doogan if he had changed his mind and reminded him that he could purge himself of the contempt by testifying. Doogan refused. The court then sentenced him to six months in the county jail, consecutive to the prison term he was already serving, but left Doogan the option of purging the contempt order by testifying before the close of the state's case in Armstrong's sentencing trial. Doogan now challenges the trial court's contempt order.

¶3 Because we do not have jurisdiction to review contempt orders on appeal, *see State v. Mulligan*, 126 Ariz. 210, 216, 613 P.2d 1266, 1272 (1980), we treat this as a special action, *State v. Hovey*, 175 Ariz. 219, 220, 854 P.2d 1205, 1206 (App. 1993). We review a trial court's determination for whether it was "arbitrary and capricious or an abuse of discretion." Ariz. R. P. Spec. Actions 3(c), 17B A.R.S.

¶4 Doogan contends the court erred in characterizing the contempt as criminal because it employed a characteristic sanction for civil contempt when it allowed Doogan to purge the contempt if he agreed to testify. *See State v. Cohen*, 15 Ariz. App. 436, 440, 489 P.2d 283, 287 (1971) (contempt is civil "when the petitioners carry 'the keys of their prison in their own pockets'"), *quoting In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902). Although Doogan does not articulate specifically why he would be entitled to relief even if we concluded the trial court incorrectly characterized the contempt order, he suggests the unconditional term of incarceration eventually imposed would then be illegal.

¶5 Rule 33.1, Ariz. R. Crim. P., authorizes a court to hold a person in contempt when he or she "wilfully disobeys a lawful writ, process, order, or judgment of a court by doing or not doing an act or thing forbidden or required, or who engages in any other wilfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court." Generally, criminal contempt consists of an act which "obstruct[s] the administration of justice or tend[s] to bring the court into disrepute" and "punishment is inflicted for the primary purpose of vindicating public

authority" while civil contempt "consists of failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding" and the orders are remedial in nature. *Cohen*, 15 Ariz. App. at 440, 489 P.2d at 287.

¶6 But Doogan overlooks that contempt classifications may overlap—a contempt citation may be both criminal and civil in nature. *See Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966) ("[T]he same acts may be both criminal contempt and civil contempt, and quite often are."). Here, the court acknowledged that the opportunity it provided Doogan to purge the contempt order was "truly not an animal of criminal contempt but rather one of civil contempt," but chose to extend the remedy as a benefit to Doogan in any event. We are aware of no case law, nor does Doogan direct us to any, that prohibits a trial court from applying a hybrid sanction to simultaneously induce the contemnor to comply with a court order and punish him for defying it in the first instance.

¶7 Doogan also argues that the trial court erred in finding him in contempt because, with his prior testimony available for use in Armstrong's penalty trial, no harm was done to the court or the parties.[1] But Arizona law specifically authorizes a court to find a person in contempt for refusing to testify after the court has granted use immunity. *See*

[1]Doogan contends in his reply brief that the trial court should not have found him in contempt because he fulfilled his part of his plea agreement by testifying in the original trial. However, we will not consider issues raised for the first time in a reply brief. *United Bank v. Mesa N. O. Nelson Co., Inc.*, 121 Ariz. 438, 443, 590 P.2d 1384, 1389 (1979).

A.R.S. § 13-4064. That statute requires no showing of ultimate harm to the litigants arising from the refusal to testify.

¶8 Even were such a showing required, we disagree that Doogan's refusal to testify here was without impact merely because the state eventually presented his previous trial testimony during the aggravation/mitigation trial. Doogan's refusal to testify following a direct court order itself diminished the dignity of the court. And, both parties lost the opportunity to elicit new testimony from Doogan. We think it likely that the range of topics relevant to Armstrong's punishment might have been different in some respects than those relevant to Armstrong's guilt. And, the jury lost the opportunity to observe Doogan's demeanor while testifying, an important tool for assessing his credibility.

¶9 For the foregoing reasons, Doogan has not met his burden of persuading us that the trial court either acted arbitrarily or capriciously or abused its discretion when it issued the contempt sanction against him. Therefore, although we accept special action jurisdiction, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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JOSEPH W. HOWARD, Judge